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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 582

WILLIAM RANCE and RUTH V. RANCE,
Petitioners,
against
THE SPERRY AND HUTCHINSON COMPANY,
Respondent.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF RESPONDENT IN OPPOSITION

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Questions Presented

In addition to the questions presented for review in the Petition for Certiorari, respondent tenders the following question which is also raised by the Petition in this action:

> **Do antitrust violations claimed to exist in the contractual arrangements between a trading stamp company and its licensees and their customers constitute a bar to injunctive relief in a common law action for unfair competition against persons not parties to the allegedly unlawful arrangements?**

Statement of the Case

Respondent, The Sperry and Hutchinson Company ("S&H"), has been engaged in the trading stamp business since the turn of the century (R. 620). The object of the business is to promote retail sales and encourage cash payments (R. 414). For a fee, measured by the number of stamps taken, respondent licenses the retail merchant to issue its stamps at the rate of one stamp for every 10 cents paid by his customer in cash (Pl. Ex. 1A; R. 401, 412). Title to the stamps is retained by S&H (R. 621). The customer pastes the stamps in a collector's book, and when, but not before, the customer has collected one full book (1200 stamps), respondent redeems the stamps in merchandise which the customer selects at one of respondent's redemption centers or chooses from respondent's catalogue (R. 622).

S&H is not the only trading stamp company in the United States. There are some 400 others, some of which operate in Oklahoma, but S&H is the oldest (R. 433, 625). It maintains ten great regional warehouses, over 700 redemption centers, and spends millions of dollars annually on radio, T.V., newspaper and magazine advertising (R. 415, 425, 622-23).

The success of the promotional service which S&H provides and for which its licensees pay depends upon two things: first, S&H must advertise and provide attractive, high quality redemption merchandise at fair prices (in terms of stamps); and second, the housewife must be required to fill at least one book with stamps before she becomes entitled to any of this merchandise. In other words, her interest must be aroused so that she

will return again and again to S&H licensees until she has filled at least one book of stamps.

Petitioners operate a "trading stamp exchange" where they buy, sell, or, for a fee, exchange one brand of trading stamps for another (R. 624). They are trading stamp brokers, dealing in all brands of trading stamps for their own profit (*ibid*).

The S&H promotional service is defeated and its licensed merchants are deprived of the advantage for which they pay if, instead of having to return to them to fill their books, their customers can stop in at petitioners' stamp exchange and buy for cash the stamps they need (R. 423-24, 624).

The success of the S&H promotional system also depends upon the maintenance of the value of the S&H franchise to the licensee. If every merchant on the block or in a given trading area could use the same stamps. no merchant would enjoy any benefit. Accordingly, S&H generally licenses only one supermarket operator, one dry cleaning establishment, one hardware dealer, etc. in a given trading area (R. 413, 621). If the competitors of S&H licensees can drop in at petitioners' stamp exchange and buy the stamps they need to issue to their customers, the competitive advantage for which the S&H licensees have paid S&H is lost.

It is for these reasons, all of them vital to the success of the S&H promotional service, and not for any arbitrary or monopolistic purpose, that S&H retains title to its stamps and seeks to prevent the unauthorized trafficking in its stamps by stamp brokers such as petitioners. The position which petitioners occupy is that of the parasite. They provide none of the value which the trading stamps represent, none of the good will which

the stamps embody. The effect of their operation is to impair the value of the stamps as a promotional device (R. 624).

In unanimously affirming the trial court's judgment enjoining petitioners from trafficking in S&H stamps, the Supreme Court of Oklahoma found that petitioners' activities constituted acts of unfair competition which reduced the value of respondent's services to its licensees, since it weakened the collector's incentive to continue patronizing S&H licensees in order to fill her collector's books (R. 261). The court noted that S&H and its licensees had expended great amounts of money to create a demand for the stamps as a means by which collectors can receive a benefit by patronizing S&H licensees and that S&H had created good will in connection with its stamps which petitioners appropriated against its wishes (*ibid*). In sum, petitioners' activities constituted "a wrongful and unwarranted interference with plaintiff's business" (*ibid*).

Petitioners here challenge none of the foregoing findings and conclusions. They argue that even though they are guilty of unfair competition, interference with respondent's business and appropriation of respondent's good will, the courts below should have denied relief because respondent's method of doing business violates the antitrust laws of the United States.

ARGUMENT

POINT I

Respondent's method of doing business does not violate the antitrust laws.

A. No unlawful tying arrangement exists.

Petitioners appear to claim that there are two illegal tying arrangements involved in respondent's system. First, a tie-in is said to arise because the consumer, in order to buy merchandise from an S&H licensee, must also purchase S&H stamps. Second, it is claimed that once having received the stamps, the consumer is tied to the merchandise available at S&H redemption centers. It is further contended, without support in the record, that the latter tie-in lessens competition in the sales of the merchandise offered for redemption. The facts available in the present record concerning respondent's system of doing business, however, simply cannot be forced into the mold of tying arrangements.

In *Northern Pac. Ry. Co.* v. *United States,* 356 U. S. 1 (1958), this Court defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." 356 U. S. at 5-6. The Court explained that "the vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another" and that the requisite economic power must be sufficient "to impose an appreciable restraint on free competition in the tied product * * *." *Id.*, at 11.

The merchant who issues trading stamps pays for the stamp service for the purpose of attracting customers into his place of business. He does not sell stamps to his customers any more than he sells redeemable cash register tapes, coupons, door prizes, paper bags, air conditioning, and other similar items which are also offered without charge as promotional devices and store services to attract customers. The merchant makes but one sale and that is the sale of the merchandise in his store (R. 263). Stamps are used simply as a promotion to increase the sales of that merchandise; like baseball cards, they are characteristically issued "in combination with some other product, and not alone." *In the Matter of Topps Chewing Gum, Inc.,* 3 CCH Trade Reg. Rep., Par. 17, 251 (F.T.C. 1965). Moreover, it is evident that there can be no sale of S&H stamps by the licensee since the courts below held that, as a matter of state law, S&H at all times retained title to the stamps (R. 259, 625). Hence, there is no second, separate product sold any more than was true in *Times-Picayune Pub. Co.* v. *United States,* 345 U. S. 594 (1953).

Respondent's claim that licensees make "block" sales of stamps and merchandise because the consumer must pay for the stamps whether she accepts them or not is without merit. No payment is exacted by stamp-issuing stores from their customers relating to the fact that stamps are issued, and nothing in the record supports the contention that retail prices are raised to reflect the cost of the stamp program. In fact, if the stamp service is successful (and there is no reason for the merchant to use the service otherwise), the licensee will increase his volume of business, thus lowering his per unit cost of operation, and his profit on the additional goods he

sells will be greater than the cost of the stamp service. Under these circumstances, there will be no need for him to raise the prices which he charges for his goods.

In addition to the fact that no tie-in or block sale exists because there is but one sale of merchandise by the licensee, it is also apparent that the economic power necessary to effectuate an illegal tying arrangement is lacking from this case. The stamp saver is not forced, coerced or pressured to buy either trading stamps or the merchandise for which the stamps may be redeemed. There exists on the part of S&H or its licensees no economic leverage to compel a consumer to take trading stamps in order to obtain the licensee's merchandise or respondent's redemption merchandise. Under the franchise system followed by S&H, only one merchant engaged in a particular kind of business is generally licensed to handle S&H stamps in a trading area, leaving numerous other competing retailers to whom the consumer may turn if she does not want S&H stamps or if she desires competing trading stamps. Petitioners' frequent reference to the fact that many S&H licensees probably sell patented products misses the point: respondent's licensees are retailers, not patentees, and there are numerous other competing retailers offering the very same patented products, as well as retailers offering competing stamps, to whom the customer may turn if she does not desire respondent's stamps. As this Court said in *Northern Pac. Ry. Co.* v. *United States,* 356 U. S. 1, 6 (1958):

> "• • • Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most."

Every time a merchant furnishes something other than the basic product that he is selling he may be depriving someone else of the opportunity of selling that "extra something". This is true whether the "extra something" is a paper bag, a reusable container in which the product has come to the merchant or in which he places it, or one of the myriad of promotional gifts and devices which characterize the American system of retail distribution. If the consumer believes that the merchant has raised his prices to cover the cost of the "mix" of promotional elements employed to attract customers, or if he is dissatisfied with the nature or quality of those elements, he is free to take his business elsewhere and neither respondent nor its licensee has the economic power to compel him to do otherwise.

B. No resale price maintenance or price fixing arrangement exists.

Petitioners suggest that respondent, through the provision in its license agreement which requires a licensee to issue one S&H stamp for each ten cents paid, and through its policy of unilaterally determining the number of stamps required to be redeemed in exchange for merchandise, is engaged in resale price maintenance or price fixing. The suggestion fails to withstand analysis.

First, there is no agreement concerning the resale of respondent's trading stamps because those stamps are neither sold nor resold. The stamps are issued (not sold) by licensed merchants to their customers at the rate of one for every ten cents paid in cash for the licensee's merchandise as tokens which may be redeemed for merchandise pursuant to the S&H catalogue. The stamps are never sold separately.

Second, S&H has no control over and does not concern itself with the prices charged by its licensees for the goods they sell, nor does it control or seek to limit the number of promotional devices or the amount of the discounts which the licensee may wish to grant. Under the S&H license agreement, the licensee is free to give other trading stamps, redeemable cash register tapes, premium merchandise or any other trade stimulants he chooses to use. S&H simply tells him that, for reasons completely unrelated to his prices, he must offer one S&H stamp on each ten cent increment of a sale, for if the licensee were not required to offer stamps to his customers on a regular basis, he would receive from respondent a valuable franchise without incurring any obligation on his part to make use of it, and, hence, to help pay for it.

Petitioners' contention that respondent is engaged in resale price maintenance and price fixing through its policy of establishing the redemption rate of stamps for its own merchandise also makes no sense. Petitioner is saying nothing more than that respondent has fixed its own redemption rates. Such unilateral action does not violate the antitrust laws.

POINT II

Respondent's alleged violation of the antitrust laws constitutes no defense to this action.

Even if there were a basis for petitioners' contention that respondent has violated the antitrust laws, such a violation is no defense to the action at bar to enjoin petitioners from engaging in conduct constituting unfair competition.

This action is not a suit by respondent against one of its licensees to enforce the terms of the contract between them; it is an action to enjoin a third party, with whom respondent and its licensees have no contractual relations, from causing irreparable damage to respondent's business, reputation and good will. Petitioner's argument, as we understand it, is that respondent's contracts with its licensees and, through its licensees, with collectors of S&H Green Stamps, constitute tying arrangements and a system of resale price maintenance which violate Section 1 of the Sherman Act and Section 3 of the Clayton Act, 15 U.S.C. §§1, 14 (1958), and that these alleged violations should cause a court of equity to deny relief to respondent against a third person who commits acts of unfair competition by appropriating respondent's good will and valuable services for his own benefit. This and other Courts have repeatedly held that the defense of illegality may not be sustained under such circumstances. *Kelly* v. *Kosuga,* 358 U. S. 516 (1959); *Wilder Mfg. Co.* v. *Corn Products Ref. Co.,* 236 U. S. 165 (1915); *Connelly* v. *Union Sewer Pipe Co.,* 184 U. S. 540 (1902); *Fuller* v. *Berger,* 120 Fed. 274 (7th Cir. 1903), *cert. denied* 193 U. S. 668 (1904); *Revlon, Inc.* v. *Regal Pharmacy, Inc.,* 29 F.R.D. 169 (E.D. Mich. 1961).

In *Revlon, Inc.* v. *Regal Pharmacy, Inc., supra,* the court, in specifically rejecting as a defense to an unfair competition action a claim that the plaintiff's system of distribution violated the antitrust laws, said:

> "In any event, an antitrust violation does not destroy the participant's right to be protected from unfair competition unless the participant is seeking the aid of a court in equity to perpetuate an illegal system." 29 F.R.D. at 177.

Although S&H has attempted to protect its business, reputation and good will by means of its licensing agreements, it is not here attempting to enforce the provisions of those agreements, since petitioners were strangers to them. Respondent's right to relief in this action rests squarely upon its common law right to prevent another person from appropriating without consent the benefits of its efforts for his own profit. *International News Service* v. *Associated Press,* 248 U. S. 215 (1918).

The record clearly shows that respondent, through the expenditure of money for advertising, organization and the establishment of a vast redemption system has created a popular and reputable business upon which petitioners have fastened themselves, using that reputation, popularity and good will as the means by which they seek profit for themselves (R. 261, 624). Since respondent's right to injunctive relief is therefore bottomed upon the right to protect its business from the unfair competition of a party with whom it has had no dealings, respondent's license agreements and arrangements with persons with whom it does business are collateral to its right to relief. Under these circumstances, this Court has stated that a violation of the Sherman Act is no ground for denial of such relief:

> "• • • Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.'" *Kelly* v. *Kosuga,* 358 U. S. 516, 520-21 (1959).

CONCLUSION

For all the foregoing reasons, the Petition for Certiorari to the Supreme Court of the State of Oklahoma should be denied.

October 18, 1965

Respectfully submitted,

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